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No. 08-568

Supreme Court, U.S.
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In The
Supreme Court of the United States

JAY HOWARD ROTHHAUPT,

Petitioner,

v.

RON WAYNE DICKOW, individually and in his official capacity as Deputy Carroll County Sheriff,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Sixth Circuit correctly affirmed the decision of the United States District Court for the Eastern District of Kentucky with regard to: (1) the exclusion of references at trial to a state law providing that police officers may not arrest subjects for misdemeanors not committed in the officer's presence and (2) the language contained in the jury instructions.

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Although the Petition attacks the lower courts' decisions regarding the relevancy of Kentucky Revised Statute § 431.005(1) to Petitioner's Fourth Amendment claim, the Petition did not set forth the provisions of that statute. It provides:

> (1) A peace officer may make an arrest:
>
> (a) In obedience to a warrant; or
>
> (b) Without a warrant when a felony is committed in his presence; or
>
> (c) Without a warrant when he has probable cause to believe that the person being arrested has committed a felony; or
>
> (d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or
>
> (e) Without a warrant when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his presence, except that a violation of KRS 189A.010 or KRS 281A.210 need not be committed in his presence in order to make an arrest without a warrant if the officer has probable cause to believe that the person has violated KRS 189A.010 or KRS 281A.210.

COUNTERSTATEMENT OF CASE[1]

As a hobby, Seldon and Phyllis Scott sell items on eBay, an internet website that hosts online auctions. In July 2001, the Scotts listed four Pfaltzgraff tumblers on eBay in a listing that contained a photograph and description indicating that one of the tumblers had a "manufacture flaw in the glaze on the rim." Petitioner, Jay Rothhaupt, who lives in Colorado Springs, submitted the winning bid of $59.00. (R. 109 Trial at TR 156-157, 171, JA 337-338, 347; R. 20 MSJ Exh. 1 and 2, JA 81-82)

After receiving the tumblers, Petitioner sent the Scotts an email message, claiming:

> . . . the four tumblers . . . have the following flaws:
>
> > Tumbler 1. Varying width of missing glaze (approx. 1/8" wide average) around approx. 80% of the bottom edge.
> >
> > Tumbler 2. Extensive, dark cracks in the glaze (aka crazing) over both the exterior and interior. Varying width of

---

[1] Petitioner's Statement of the Case relies exclusively on Petitioner's own deposition testimony. Such an approach is misplaced. Where, as here, the underlying case was resolved by jury trial, trial testimony – not deposition testimony – matters. Moreover, there is no obligation that the Court assume the facts most favorable to Petitioner. Therefore, a one-sided version of the facts, especially one the jury apparently did not credit, is inappropriate.

> missing glaze (approx. 1/8" wide average) around approx. 2/3 of the bottom edge.
>
> Tumbler 3. Two pits in the glaze on the interior and one pit on the top of the rim. Section of missing glaze approx. 1 mm x 2 mm on the edge of the rim. Varying width of missing glaze (approx. 1/8" wide average) around approx. 90% of the bottom edge. Glaze cracks over several square inches of the interior.
>
> Tumbler 4. Pit in the glaze on the top of the rim. Extensive glaze bumps approx. 1 mm diameter or less on the entire exterior (except for the pedestal). No glaze missing from the bottom edge.

(R. 20 MSJ Exh. 3, JA 83) The message asked the Scotts to "let me know your position regarding the obvious, undescribed flaws." (R. 20 MSJ Exh. 3, JA 83)

Through July 31, 2001, Petitioner and the Scotts exchanged email messages in an attempt to resolve the dispute. Initially, Mrs. Scott offered Petitioner a full refund without questioning his assertions about the defects. She explained, " . . . we do this as a hobby and we try to describe the items to the best of our ability and do not try to deceive anyone." (R. 20 MSJ Exh. 4, JA 84)

Petitioner was not satisfied with a refund. He wanted additional compensation:

> . . . a refund does not satisfy your contractual requirement for the subject auction . . . If a buyer were satisfied having the money instead of having the items described in the auction, the buyer wouldn't have bid on the auction. Please let me know if you have any alternatives – I'm optimistic this problem can be resolved.

(R. 20 MSJ Exh. 5, JA 85)

The following day, Mr. Scott sent Petitioner an email, again offering a full refund upon return of the tumblers. (R. 20 MSJ Exh. 6, JA 86) Petitioner responded, accused the Scotts of criminal fraud, and threatened to file an eBay "fraud report" against them. (R. 20 MSJ Exh. 7, JA 87)

On July 30, 2001, Mr. Scott offered Petitioner – for the third time – a full refund, offered to pay return shipping charges, and invited Petitioner to telephone Scott at Scott's expense to discuss the matter. He said the Scotts felt harassed by the tone and suggestions in Petitioner's communications, and that the Scotts had "done all that is possible" to address his dissatisfaction. (R. 20 MSJ Exh. 8, JA 88)

The next day, Petitioner accused the Scotts of lying:

> I'll start by identifying your falsehoods . . . clearly there are additional things you can do to resolve the problem you've caused via your fraud, so your claim that you 'have done all

> that is possible' is false. Perhaps you're confusing the set of things you're 'willing' to do with the set of things you 'can' do.

(R. 20 MSJ Exh. 9, JA 89) In addition, Petitioner advised the Scotts he intended to file a complaint with PayPal, the internet website that facilitated Petitioner's payment for the tumblers, and a fraud complaint with the U.S. Postal Service. (R. 20 MSJ Exh. 9, JA 89) Petitioner did not indicate whether he intended to return or keep the tumblers, and the Scotts heard nothing more from him until the day of the arrest that is the subject of this action.

In the meantime, Mr. Scott, who was a Special Deputy with the Carroll County Sheriff's Department and who serves as Carroll County Disaster Emergency Services Coordinator, had talked with his co-workers about his difficulties with Petitioner. In particular, Mr. Scott told Deputy Ron Dickow about his online transaction with Petitioner, that Petitioner was unhappy with the item, and that Petitioner was sending him annoying and alarming emails. (R. 109 Trial at TR 26, 42, 69-70, 171-173, JA 287, 290, 298-299, 347-349; R. 110 Trial at TR 3-6, JA 371-374)

In addition, because they were suspicious of Petitioner and unnerved by his accusations, the Scotts contacted other eBay users to determine if others had the same experience with Petitioner. Several responded, including a woman who "really didn't want to say anything bad about [Petitioner] because, "I am afraid of him"; someone who reported

receiving "threatening and nonproductive" messages from Petitioner; and, a woman who indicated Petitioner was becoming "more threatening, more bullying" with her. (R. 20, MSJ Exh. 10, JA 90-102)

At 4:15 p.m. on September 21, 2001[2] – ten days after "9-11" and nearly two months since the Scotts had last heard from Petitioner – Mrs. Scott answered her home telephone. The male caller did not identify himself, but said he had a package to deliver to 1712 Hilltop Drive, was "not far away," would be there "in just a few minutes," and asked whether anyone would be home. When Mrs. Scott asked for more information about the caller and the package, the caller said only that the package was from Colorado. Mrs. Scott was not expecting a delivery and did not make the connection between Colorado and Petitioner, so she told the caller to "hold on a minute" and turned to Mr. Scott to discuss the matter. The caller abruptly hung up. (R. 109 Trial at TR 76-77, 132-134, 159, 174, RA 300-301, 318-320, 340, 350)

A few minutes later, a strange man parked his car in front of the Scotts' house and approached the house carrying a box. The man told Mr. Scott, who was standing inside the house with the front door slightly ajar, that he had a delivery for 1712 Hilltop Drive. Without identifying himself, what was in the package, or where the package was from, the man

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[2] The Petition contains the wrong date. The arrest occurred on September 21, 2001, not 2002. (Petition, p. 3)

demanded $100.00 – nearly twice what Petitioner had paid for the tumblers – in exchange for the package. Mr. Scott asked the man multiple times "who are you with," and eventually Petitioner identified himself. Mr. Scott told Petitioner to leave, but Petitioner did not. Only after Mr. Scott refused the package, told Mrs. Scott to call the police, and obtained Petitioner's license plate number, did Petitioner leave. (R. 109 Transcript, pp. 134-136, 139-141, 159-165, 174-176, JA 320-322, 323-325, 340-346, 350-352)

Deputy Dickow was dispatched to respond to Mrs. Scott's call, having been told by the dispatcher that "a subject" was refusing to leave the Scotts' property. While en route, Dickow heard radio transmissions indicating that the subject had left the property in a vehicle bearing Colorado license plates and that Mr. Scott was following the subject. Dickow caught up with them on Interstate 71, and pulled the subject – who turned out to be Petitioner – over. Mr. Scott pulled behind Dickow's cruiser. (R. 109 Trial at TR 175-176, JA 351-352; R. 110 Trial at TR 6-9, JA 374-377)

The parties disagreed about what happened at the scene of the arrest.

At trial, Dickow and Mr. Scott testified that Dickow spoke separately with Mr. Scott and Petitioner. (R. 109 Trial at TR 176, JA 352; R. 110 Trial at TR 9-13, JA 377-381) According to Dickow, Mr. Scott told him Mrs. Scott had received a telephone call from a man who refused to identify himself, wanted

to know whether anyone would be home, and hung up. Mr. Scott told Dickow that Petitioner showed up at the Scotts' house a few minutes after the telephone call, that Petitioner refused to leave when told multiple times to do so, and that Petitioner had demanded significantly more money than the purchase price of the tumblers. Dickow also testified that Mr. Scott mentioned an email he sent to Petitioner, expressly telling Petitioner he wanted no further communications or contact with him. (R. 110 Trial at TR 11, 27, JA 379, 384)

Dickow also testified at trial about his discussion with Petitioner at the scene. He testified at trial that he saw a rifle case in the back seat of the car, causing him concern about Petitioner's intentions. Dickow asked Rothhaupt whether he had been at the Scotts' home. Petitioner admitted he had, but characterized his purpose as trying to return a package "COD" at the Scotts' invitation. (R. 110 Trial at TR 10-11, 14, 26, JA 378-379, 382-383)

Mr. Scott's trial testimony was essentially consistent with Dickow's. Of particular note, Mr. Scott testified he told Dickow about the email he had sent Petitioner after Petitioner rejected his third offer of a full refund. In that email, Mr. Scott told Petitioner not to contact the Scotts again. (R. 109 Trial at 176-180, JA 352-356)

On the other hand, Petitioner's trial testimony was markedly different from Dickow's and Scott's. He testified that Dickow and Mr. Scott approached his

vehicle together and that Mr. Scott participated in questioning him. Petitioner testified he told Dickow that Mr. Scott had given him permission to come onto the property, and that Mr. Scott did not tell Petitioner to leave, but rather, told him to stay. Further, Petitioner testified that Dickow could not possibly have seen the rifle in his car because he had intentionally obscured the rifle from the view of others. (R. 109 Trial at TR 82-87, 141-152, JA 302-307, 325-336)

In any event, Petitioner was arrested and charged with stalking in the second degree, harassing communications, theft by deception, and criminal trespass in the third degree. (R. 109 Trial at TR 60-61, JA 295-296) Petitioner was not convicted of any of these charges.

PROCEEDINGS BELOW

On September 20, 2002, Petitioner filed a civil action pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the Second, Fourth, Fifth and Fourteenth Amendments, as well as assorted state-law torts. (R. 1 Complaint, JA 7-28) The Eastern District of Kentucky exercised jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331 and 1367.

The District Court granted summary judgment to Defendants, Carroll County,[3] Sheriff Charlie Maiden, Deputy Sheriff Ron Dickow, Seldon Scott and Phyllis Scott on all federal claims, and declined to exercise supplemental jurisdiction over the state-law claims. (R. 45 Judgment, JA 209-211) Petitioner appealed the dismissal of his federal claims to the Sixth Circuit on July 20, 2004. (R. 46 Notice of Appeal, JA 212-213) In *Rothhaupt I*,[4] the Sixth Circuit reversed and remanded on one issue – the Fourth Amendment false arrest claim against Dickow – but otherwise affirmed the District Court's decision. (R. 50 Judgment, JA 214-231)

Petitioner filed a Petition for Writ of Certiorari to this Court, which was ultimately denied. (R. 59 Agreed Order, JA 232-233) Thereafter, the sole remaining issue – whether or not Dickow had probable cause to arrest Petitioner – was tried, and the jury returned a verdict in Dickow's favor. (R. 102 Judgment, JA 265) The jury found that Dickow had probable cause to arrest Petitioner for trespassing,

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[3] Although Carroll County was not identified in the Complaint caption as a defendant, Carroll County was a defendant by virtue of the claims against Maiden, Dickow and Scott in their official capacities. *Kentucky v. Graham*, 473 U.S. 159 (1995).

[4] That appeal was styled *Rothhaupt v. Charlie Maiden et al.*, Sixth Circuit Case No. 04-5868. The resulting decision is reported as *Rothhaupt v. Maiden*, 144 Fed. Appx. 465 (6th Cir. 2005).

stalking and harassing communications. (R. 101 Jury Verdict, JA 262-264)

Dissatisfied, Petitioner appealed the jury's verdict to the Sixth Circuit. He argued that the District Court erred in excluding references at trial to Kentucky Revised Statute § 431.005, which provides – with a few exceptions not relevant here – that police officers in Kentucky may only arrest for misdemeanors when those misdemeanors are committed in their presence. In addition, Petitioner argued that the District Court erred in instructing the jury regarding probable cause. In that respect, Petitioner contended the District Court should not have informed the jury that, "Once an officer establishes probable cause, he is under no obligation to continue investigating and may instead pursue the arrest of a suspect." He also contended the instruction should have included the following language from the Sixth Circuit's decision in *Rothhaupt I*:

> A mere allegation of criminal behavior, while possibly justifying a brief investigatory detention, is insufficient by itself to establish that a crime has been committed. To establish probable cause in the face of such a naked allegation, an officer must investigate further and find objective factors to corroborate the claim.

(Appellant's Brief, pp. 12-13, 15)

In a sound and well-reasoned opinion, the Sixth Circuit affirmed the District Court's exclusion of

K.R.S. § 431.005(1), concluding that it was not relevant because a federal constitutional claim cannot be premised on a violation of state law. (Petitioner's Appendix 8a-10a) The Sixth Circuit also affirmed the jury instructions as having fairly and "adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in its decision." (Petitioner's Appendix 6a-7a)

The instant Petition – Petitioner's second before this Court on these facts – followed.

REASONS FOR DENYING THE PETITION

I. THE EXCLUSION OF K.R.S. § 431.005(1) DOES NOT PROVIDE A COMPELLING REASON TO JUSTIFY THE EXERCISE OF CERTIORARI IN THIS CASE.

With a few exceptions not relevant under the facts of this case, Kentucky has a statute requiring that police officers cite, rather than arrest, misdemeanor offenders for crimes not committed in the arresting officer's presence. K.R.S. § 431.005(1). Respondent, Carroll County Deputy Sheriff Ron Dickow, believed Petitioner had committed a misdemeanor offense, based on information Dickow received about events that occurred outside of Dickow's presence. Instead of citing Petitioner, Deputy Dickow arrested him. Petitioner contends the District Court should have instructed the jury regarding the state-specific arrest statute before the jury decided the

pivotal issue in Petitioner's Fourth Amendment claim against Deputy Dickow, i.e. whether Deputy Dickow had probable cause to believe that Petitioner had committed any of the offenses.

Whether the analysis of a Fourth Amendment claim is affected by a state-specific arrest statute is an issue federal courts have squarely addressed time and again. *See, Virginia v. Moore*, ___ U.S. ___, 128 S. Ct. 1598 (2008); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3 (1st Cir. 1997); *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974); *U. S. v. Van Metre*, 150 F.3d 339 (4th Cir. 1998); *Fisher v. Washington Metropolitan Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982); *Fields v. City of South Houston, Texas*, 922 F.2d 1183 (5th Cir. 1991); *U. S. v. Smith*, 73 F.3d 1414 (6th Cir. 1996); *Woods v. City of Chicago*, 234 F.3d 979, 991-994 (7th Cir. 2000); *Benigni v. Smith*, 121 Fed. Appx. 164 (8th Cir. 2005); *Barry v. Fowler*, 902 F.2d 770 (9th Cir. 1990); *U. S. v. Green*, 178 F.3d 1099 (10th Cir. 1999); *Knight v. Jacobson*, 300 F.3d 1272 (11th Cir. 2002); *Hotaling v. LaPlante*, 167 F. Supp. 2d 517 (N.D.N.Y. 2001); *Tucker v. County of Jefferson*, 110 F. Supp. 2d 117 (N.D.N.Y. 2000); *Christopher v. Nestlerode*, 373 F. Supp. 2d 503 (M.D.Pa. 2005); *Schmidt v. City of Lockport*, 67 F. Supp. 2d 938 (N.D.Ill. 1999). These courts have consistently concluded that the contours of the Fourth Amendment are not defined with reference to the requirements of state law - in other words, that an arrest complies with the Fourth Amendment if there is probable cause to support it, notwithstanding any state-specific statute placing

additional restrictions on a police officer's arrest authority.

Had there been any doubt whatsoever on that issue over the years, this Court laid that doubt to rest just six months ago. Specifically, in *Moore*, *supra*, a police officer suspected that a driver was operating a vehicle on a suspended license, and affected a traffic stop. Having confirmed that the driver's license was indeed suspended, the officer arrested the driver for that offense – a misdemeanor – even though a state statute in Virginia dictated that an officer could not arrest a misdemeanant. Following the arrest, the police officer searched the driver, found he was in possession of crack cocaine, and charged him with a drug crime. At his criminal trial, the driver argued that the Fourth Amendment required suppression of the drug evidence because the evidence was secured following an unlawful arrest. On those facts, this Court refused to accept the premise on which the driver's suppression argument was based, i.e. that his arrest was unlawful under the Fourth Amendment. The Court ruled that an arrest is lawful under the Fourth Amendment so long as it is supported by probable cause, notwithstanding any state-specific limitation on the circumstances under which an officer may arrest as opposed to issuing a citation. This Court noted that individual states are free to place limitations on an officer's discretion to arrest, but that any such limitations imposed by the state do not affect the Fourth Amendment inquiry. *Id.* at 1605-1607.

The implications of *Moore* on the issue presented by this Case are obvious. Since state-imposed limitations on an officer's discretion to arrest do not affect the Fourth Amendment inquiry, K.R.S. § 431.005(1), which generally provides that a police officer may not arrest for a misdemeanor committed outside of his presence, has no bearing on the validity of Petitioner's arrest under the Fourth Amendment. As such, the District Court correctly refused to instruct the jury regarding the provisions of K.R.S. § 431.005(1).

In light of this Court's very recent pronouncement on the issue, there is no compelling reason to consider the issue yet again.

Petitioner's contention that the lower courts' opinions in this case somehow conflict with this Court's holdings and with the decisions in other Circuits (Petition, p. i) is nothing more than a contrived attempt to address Rule 10's "compelling reasons" standard. That contention fails to account for this Court's decision in *Moore*, relying instead on *Michigan v. DeFillippo*, 443 U.S. 31 (1979), *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Carroll v. U. S.*, 267 U.S. 132 (1925), which discuss the probable cause standard in contexts far removed from the instant case. Neither *DeFillippo*, *Pugh* nor *Carroll* addresses the specific issue presented in this case, i.e. whether a state-specific law governing arrest procedure is relevant to the Fourth Amendment's probable cause inquiry. (Petition, pp. 9-13) Consequently, Petitioner has not supported his contention that the Sixth

Circuit and District Court opinions in the present case conflict with this Court's holdings.

Nor does the Petition cite a single case from any Circuit other than the Sixth that would substantiate the claimed existence of a conflict among the lower federal courts. (Petition, pp. 9-13) Consequently, Petitioner has not supported his contention that the Circuit Courts are split on this issue.

Not even the two Sixth Circuit cases cited in the Petition demonstrate a compelling reason to exercise certiorari in this case. The plaintiffs in those cases – *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir. 1999), and *Painter v. Robertson*, 185 F.3d 557 (6th Cir. 1999) – were arrested and charged with violations of Ohio Revised Code § 2923.12. Because O.R.C. § 2923.12 set forth the *substantive elements* of the offense with which those plaintiffs were charged, it was clearly relevant to the issue of probable cause. A jury cannot determine "whether the facts and circumstances within an officer's knowledge are sufficient to warrant a prudent person . . . in believing that the suspect has committed . . . an offense" without knowing what the substantive elements of the offense are. *DeFillippo, supra.* As a result, the courts in *Burrows* and *Painter* properly considered O.R.C. § 2923.12, just as the District Court properly instructed the jury regarding the substantive provisions of the state law offenses with which Petitioner was charged. *Burrows* and *Painter* certainly demonstrate that state law is relevant to the Fourth Amendment inquiry to the extent that state law defines the substantive elements

of the offense on which an arrest is premised. They do not, however, support the proposition for which Petitioner relies on them, i.e. that state-specific statutes relating to arrest *procedures* are relevant in determining whether a particular arrest violates the Fourth Amendment.

There being a recent case on point from this Court, and there being no conflict among the lower federal courts on the issue, there is no compelling reason to justify the exercise of certiorari.

II. PETITIONER'S ARGUMENTS RELATING TO THE JURY INSTRUCTIONS USED AT THE TRIAL OF HIS FOURTH AMENDMENT CLAIM DO NOT PRESENT A COMPELLING REASON TO JUSTIFY THE EXERCISE OF CERTIORARI.

Petitioner also contends that this case should be reversed because the jury instructions were allegedly improper. He does not, however, suggest that the jury instructions given by the District Court and affirmed by the Sixth Circuit in this case raise any "important matter" of law within the meaning of Rule 10. Nor does he argue that the Sixth Circuit's decision regarding the jury instructions conflicts with a decision of this Court or of another Circuit. Simply put, even Petitioner does not contend that there is a "compelling reason" to justify the exercise of certiorari to review the jury instructions. Rather, he merely posits that the jury instructions did not conform to the facts

and that they were prejudicial to him. (Petition, pp. 13-17)

The lower courts' decisions regarding the jury instructions in this case were entirely consistent with applicable law.

A. THE JURY INSTRUCTION FAIRLY AND ADEQUATELY SUBMITTED THE ISSUES AND APPLICABLE LAW TO THE JURY.

At the conclusion of evidence, the District Court instructed the jury on probable cause:

> Now, let me explain what the term "probable cause" means.
>
> There was probable cause for the arrest if, at the moment the arrest was made, the facts and circumstances within Officer Dickow's knowledge and of which he had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the plaintiff, Jay Rothhaupt, had committed one of the crimes for which he was arrested.
>
> Officer Dickow arrested the plaintiff on four charges: trespassing in the third degree, stalking in the second degree, harassing communications, and theft by deception. It's not necessary that defendant Ron Dickow had probable cause to arrest the plaintiff for all of the crimes with which he was charged,

so long as he had probable cause to arrest Rothhaupt for one of those crimes.

Probable cause requires more than just suspicion, but it does not need to be based on evidence that would be sufficient to support a conviction or even a showing that the defendant's belief was probably right. Once an officer establishes probable cause, he is under no obligation to continue investigating and may instead pursue the arrest of a suspect. [. . . coughing . . .]

Now, for your information in considering whether there was probable cause to believe that Rothhaupt committed the crimes with which he was charged, those crimes are defined as follows in the Kentucky statutes.

[The Court then read the Kentucky statutes defining the four crimes with which Petitioner was charged.]

(R. 111 Jury Instructions at TR 11-15, JA 412-417)

The propriety of jury instructions are measured by the following standard:

> We review a properly preserved objection to a jury instruction by determining whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury. . . . We will reverse a judgment where the jury instruction fails accurately to reflect the law. In addition, we may reverse the trial court based on a faulty charge only if the instructions, viewed as a

> whole, were confusing, misleading, or prejudicial.

Radvansky v. City of Olmstead Falls, 496 F.3d 609, 617 (6th Cir. 2007) (internal citations omitted).

Taken as a whole, the instruction fairly and adequately reflected the law, such that the jury could make an informed decision regarding probable cause. The instruction informed the jury, consistent with well-established federal law, that: (1) an arrest is supported by probable cause if, at the moment the arrest was made, the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the plaintiff had committed one of the crimes for which he was arrested, e.g., *DeFillippo*, *supra*; *Beck v. Ohio*, 379 U.S. 89 (1964); *Peet v. City of Detroit*, 502 F.3d 557 (6th Cir. 2007); (2) where an officer arrests a person and charges him with multiple crimes, the arrest is valid if probable cause exists for at least one of the charges, e.g., *Lyons v. City of Xenia*, 417 F.3d 565 (6th Cir. 2005); and, (3) probable cause requires more than just suspicion, but it does not need to be based on evidence that would be sufficient to support a conviction, e.g., *Greene v. Reeves*, 80 F.3d 1101, 1105 (6th Cir. 1996).

In criticizing the instruction, Petitioner's argument fails to observe the applicable standard. He does not consider the subject instruction *as a whole*. Instead, he isolates one specific sentence and argues

that it renders the entire instruction invalid, notwithstanding the rest of the instruction. Specifically, he contends the instructions should not have informed the jury that, "Once an officer establishes probable cause, he is under no obligation to continue investigating and may instead pursue the arrest of a suspect." (Petition, p. 15) He also argues that the instruction should have included the following language from the Court's decision in *Rothhaupt I*:

> A mere allegation of criminal behavior, while possibly justifying a brief investigatory detention, is insufficient by itself to establish that a crime has been committed. To establish probable cause in the face of such a naked allegation, an officer must investigate further and find objective factors to corroborate the claim.

(Petitioner's Sixth Circuit Brief, pp. 12-13, 15; Petition, p. 16) Notwithstanding the inclusion of the former language and the absence of the latter, the instruction as given accurately reflected the law and was not confusing, misleading or prejudicial.

Consistent with the District Court's instruction, the law is clear that once an officer develops probable cause, he is under no obligation to investigate further. E.g., *Boykin v. Van Buren Twp.*, 479 F.3d 444 (6th Cir. 2007). Because the instruction is an accurate reflection of the law, Petitioner's complaint about the inclusion of that sentence is unfounded. In arguing otherwise to the Sixth Circuit, Petitioner attempted to distinguish *Boykin* by artificially categorizing false

arrest cases as involving either "grudge arrests" (his term) or non-"grudge arrests." He acknowledged that the *Boykin* language applies in the absence of a "grudge arrest." However, he claimed that language is inappropriate in "grudge arrest" cases, advocating instead that an officer is always required to investigate further in such cases. (Petitioner's Sixth Circuit Brief, pp. 13-14; R. 109 Trial at TR 198-199, JA 364-365)

Because the obvious flaws in that theory were exposed before the Sixth Circuit, Petitioner has been careful to avoid references to the "grudge arrest" in his Petition. Instead, he now defines *Boykin* as applicable to cases where the information within an officer's knowledge is not "perfectly credible." (Petition, p. 16) On the strength of the Sixth Circuit's decision in *Rothhaupt I*, Petitioner insinuates that the information within Deputy Dickow's knowledge was not "perfectly credible," and that the jury instruction therefore should not have included *Boykin* language. (Petition, p. 16)[5] Notwithstanding the clever recrafting of his argument, Petitioner cannot escape the flaw in his argument.

First, Petitioner's insinuation neglects the context in which *Rothhaupt I* was decided and the procedural standard that applies in that context. In

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[5] When Petitioner refers to the Sixth Circuit's opinion on p. 16 of his Petition, he is referring to the Sixth Circuit's opinion in *Rothhaupt I*.

Rothhaupt I, this Court's mission was to decide whether the evidence, as presented by the summary judgment briefs and taken in a light most favorable to Petitioner, compelled a finding that Dickow had probable cause to arrest Petitioner. With respect to "the 'who,' 'what,' 'why,' and 'how' the information came to Dickow," the Court assumed a set of facts most favorable to Petitioner, and drew all inferences – including those of credibility – in his favor. Ultimately, in *Rothhaupt I*, the Court ruled the facts and inferences it was required to assume did not compel a finding that Dickow had probable cause to make the arrest as a matter of law.

Of pivotal import, *Rothhaupt I* did not conclusively establish the facts of this case, nor did it affirmatively decide that Dickow lacked probable cause, as Petitioner suggested to the Sixth Circuit in *Rothhaupt II* and as he continues to suggest in his Petition. (Petitioner's Sixth Circuit Brief, pp. 12-15; Petition, p. 16) For example, Petitioner describes *Rothhaupt I* as having conclusively "found that the information relied upon by Dickow was unreliable under the facts within and therefore Dickow would be required to do a further investigation in order to establish probable cause." (Petitioner's Sixth Circuit Brief, p. 14; Petition, p. 16) That simply is not true. Considering the Sixth Circuit's mission in *Rothhaupt I* – and the fact that it did not remand with instructions to grant summary judgment in *Petitioner's* favor on the issue of probable cause – that case can only be construed as having ruled that a jury *could* find that

probable cause did not exist. Indeed, that is explicitly what *Rothhaupt I* says.[6] In order for a jury to find probable cause lacking, however, it would have to believe that Mr. Scott was completely unreliable and would have to credit Petitioner's testimony to the exclusion of everyone else's. Of course, while the Court in *Rothhaupt I* was required to so believe, the jury that ultimately heard the evidence and decided this case in *Rothhaupt II* was not. *See Wilson v. Morgan*, 477 F.3d 326 (6th Cir. 2007) (Sixth Circuit's decision affirming denial of summary judgment based on apparent lack of probable cause in prior appeal did not preclude magistrate from revisiting that issue on remand after presentation of evidence at trial).

Petitioner's delineation of when *Boykin* language applies and when it does not also suffers from a second basic flaw. Specifically, Petitioner's theory requires *courts* to determine whether or not the facts in a given case demonstrate that the information within the arresting officer's knowledge at the time of arrest is "perfectly credible." Of course, that usurps the role of the jury. Where the facts are in dispute, which is the case in *every* jury trial, it is the province of the jury, not the court, to determine whether and to what degree the arresting officer's sources are reliable. A jury is not required to accept a plaintiff's assertion that a particular informant is unreliable because of some motive, contrived by the plaintiff in

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[6] *Rothhaupt I, supra* at 470.

hindsight, to falsely accuse him. But Petitioner's contention with respect to the jury instructions requires a court to *accept* a plaintiff's assertions in that regard and, in effect, to *tell* the jury that a given arrest constitutes a "grudge arrest" and that the informant was unreliable because of whatever contrived motive the plaintiff can conjure up.

Moreover, Petitioner's theory carries other problems. Unless the trial judge could accurately predict how the jury perceived the facts, he would have a 50-50 chance of charging the jury correctly. And, if a court were always required to instruct the jury that an officer had a duty to "investigate further" merely because a civil rights plaintiff alleges the existence of a grudge, a plaintiff could effectively elevate the probable cause standard merely by insinuating that the informant had a grudge against him – whether or not there is factual support for that insinuation.

Of course, a logical corollary to the *Boykin* language is that a police officer must investigate until he establishes probable cause. Thus, the jury *was* apprised that an officer cannot always accept a "naked allegation," which was the general point of the language Petitioner complains was omitted from the instruction.

In addition to instructing the jury that an officer is not required to investigate further once probable cause has been established, the District Court gave the jury parameters for evaluating when probable cause has been established. Among other parameters,

the District Court instructed the jury, consistent with *Radvansky*, *supra*, and other authorities, that an officer must consider all the facts and circumstances known to him at the time, as well as the extent to which the information provided to him is reasonably trustworthy. (R. 111 Jury Instructions at TR 11-15, JA 248-253) That instruction was certainly sufficient to inform the jury that it had to consider whether, and if so, to what degree, the dispute between the Scotts and Petitioner affected Mr. Scott's reliability. Likewise, that instruction was sufficient to inform the jury that it had to consider whether it was reasonable for Dickow to be skeptical of Petitioner's claim that he had "permission" to be on the Scotts' property. Those are the considerations underlying the language Petitioner proposed for inclusion in the instruction, which the District Court properly rejected.

The precise jury instruction language Petitioner proposed was problematic because, according to *Rothhaupt I*, it represents the standard applicable when the source of an allegation is not reliable. That finding is within the province of the jury, not the court. Had the District Court included Petitioner's proposed language in the instruction, it would have essentially determined that – rather than letting the jury consider whether – the information Dickow received from Scott was unreliable.

Simply put, Petitioner's criticism of the probable cause instruction is unfounded. The instruction accurately reflects the law, and is not confusing, prejudicial or misleading.

B. THE JURY INSTRUCTION CONFORMED TO THE FACTS.

Petitioner also argues that the District Court erred in instructing the jury to consider whether Dickow had probable cause to arrest him for stalking and theft by deception, couching that argument as whether the instructions conformed to the facts. (Petition, pp. 13-14) That argument is based on the fact that Dickow initially told Petitioner he was being arrested for trespassing and harassing communications, but amended the citation to include charges of stalking and theft by deception once Dickow arrived at the Carroll County Detention Center with Petitioner. (Petition, pp. 13-14; R. 109 Trial at TR 60-62, JA 295-297) In other words, Petitioner contends that probable cause cannot be founded on charges that were not recited to the arrestee at the moment of his arrest. (R. 110 Trial at TR 34-36, JA 387-389)

The Supreme Court put this contention to rest in *Devenpeck v. Alford*, 543 U.S. 146 (2004). There, the plaintiff was arrested, but the charge against him was dismissed because a state appellate court had recently ruled that the type of conduct the plaintiff engaged in did not violate the statute he was charged under. He filed a civil rights suit against the arresting officer. The officer defended on the basis that the facts known to him at the time of the arrest provided probable cause to believe the plaintiff had committed a different crime, one that the plaintiff had never been charged with. The Supreme Court ruled that the officer could mount a defense on that basis. The Court

explained that an arrest is lawful so long as the facts within the officer's knowledge at the time of the arrest provide probable cause to believe the suspect committed *some* crime, not necessarily the crime the officer subjectively identified at the time of the arrest. *Id.* at 153; *see also Leonard v. Robinson*, 477 F.3d 347, 353 (6th Cir. 2007); *Soltesz v. City of Sandusky*, 49 Fed. Appx. 522 (6th Cir. 2002); *Colucci v. City of Aurora Police Dep't*, 2007 U.S. Dist. LEXIS 90921 (N.D.Ohio).

In light of this authority, Petitioner's arrest was lawful if, based on Dickow's knowledge at the time of the arrest, there was probable cause to believe Petitioner had committed stalking or theft by deception – even if he was not immediately charged with those crimes. As such, it was not error for the District Court to instruct the jury on those charges.

CONCLUSION

Petitioner presents no compelling reason for the exercise of certiorari, and his Petition for Writ of Certiorari must therefore be denied.

Respectfully submitted,

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